

WORKSHOP - “TOMORROW’S WASTE LEGISLATION”
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On Clarity and Legal Certainty

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The EU Forum of Judges for the Environment² was established in 2004, with the support of the then Environment Commissioner Wallström and the Environment Directorate-General of the European Commission. The essential idea behind the Forum was to provide opportunities for the exchange of information between national and European judges of the EU. It sought to build on the *Johannesburg principles*, adopted at the *UNEP Global Judges Symposium on Sustainable Development and the Rule of Law* (Johannesburg, 2002) which affirmed the central place of the independent judiciary in the implementation, development and enforcement of environmental law.

Our second conference, hosted by the United Kingdom in December 2005, was on the subject of European waste law. In advance of the conference, a questionnaire was circulated to members of the Forum, addressing a number of contentious issues which arose from European Waste law and the case-law of the European Court of Justice. As a follow-up of the Conference, the Board of EUFJE presented its observations on the proposal of the Commission for a new Waste Framework Directive. It was evident from the Conference that judges have found the definition of waste difficult to apply and that there have been divergences in the application of the Directive between courts in different Member States. Some of these have been resolved by decisions of the European Court of Justice, but others remain. We have listed in our observations a whole range of such difficulties. The conference considered whether a better definition of waste might be found, but, after having considered other definitions which apply in other parts of the world, it was obvious that there is no “Holy Grail”, so there seems no alternative than to continue with the definition we have, as vague as it may be. We made some comments on the Proposal of the Commission with a view to enhancing clarity and legal certainty. Some of these were taken on board during the next stages of the legislative process. Under the influence of the European Parliament and negotiations within the Council, an important number of provisions were modified, deleted or added. Since we didn’t have the opportunity to discuss the Common Position again, the following remarks commit only myself, not the Forum.

I think the *Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on waste and repealing certain*

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*Directives*³ allows, on the one hand, progress to be made in terms of clarity and legal certainty in many respects; on the other hand, however, some new ambiguous provisions are introduced, which will lead to new discussions and uncertainties.

In the first place I see progress in some respects.

- The proposed Directive excludes from its scope “*land (in situ) including unexcavated contaminated soil and buildings permanently connected with land*” (Art. 2.1, (b)). I do believe that the Waste regime is not designed to tackle the problem of soil contamination. Especially in those Member States where specific soil contamination and cleanup legislation exists, cumulating such legislation with the waste legislation is very difficult and in many cases even impossible. The proposal for a Directive establishing a framework for the protection of soil proves that a specific approach is needed for soil remediation, while for new cases of soil pollution there is already Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. Of course, from the moment that the contaminated soil is excavated, the waste regime will apply.

- The same can in principle be said of the exclusion of “*uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated*” (Art. 2.1, (c)). Of course here, in the absence of European standards on what is considered soil contamination and what not, there may be scope for interpretation that can be filled in by the Member States, as long as such European standards are lacking. One can find such regulations in the Flemish region of Belgium⁴. However, the question that may arise here is whether an *a contrario* reasoning must be applied or not. In other words, should uncontaminated soil and other naturally occurring material excavated in the course of construction activities that will be used for the purposes of construction in its natural state *outside* the site from which it was excavated be considered as waste? I believe that this is currently not the case in the vast majority, if not in all of the Member States. In the Flemish Region of Belgium, for example, the Regional Waste Law (Waste Decree) provides that soil, excavated outside reclamation areas, that is used in accordance with the conditions determined in or in compliance with the decree of 22 February 1995 concerning soil remediation is not waste. I think that including such materials in the waste definition is not demanded by the objectives of the proposed Directive, namely the protection of the environment and human health. So, I would have preferred wording closer to that proposed by the European Parliament, “uncontaminated excavated materials which can be used in their natural state whether in the same site *or another*”.

- The exception for “*faecal matter, straw and other natural non-hazardous agricultural or forestry material used in farming, forestry or for the production of energy from such biomass through processes or methods which do not harm the environment or endanger human health*” (Art. 2.1. f) is of course also open to interpretation. I understand that these materials are only excluded from the scope of the Directive if they are *effectively* used in such applications, and therefore not when such use is only theoretically possible, but not effectively applied. In the latter case, these materials will be waste and should be discarded for the purposes of the Directive. Here the question is also how we must understand the conditions

³ 20 December 2007, 11406/4/07, Interinstitutional File 2005/0281 (COD)- ENV 368.

⁴ ORDER OF THE FLEMISH GOVERNMENT of 5 MARCH 1996 CONCERNING THE ESTABLISHMENT OF THE FLEMISH REGULATIONS CONCERNING SOIL REMEDIATION -Chapter X Specific regulations with respect to the use of excavated soil

that they may not harm the environment or endanger human health. For faecal matter we can of course refer to the Nitrates Directive in which there are limits to the use of livestock manure within the vulnerable zones and the codes of good practices, outside these zones.

- The proposal for a directive excludes “*waste waters*” from the scope of the Directive to the extent that they are covered by other Community legislation (Art. 2.2 (a)). In comparison with the current Directive, there is no exception to the exception for “waste in liquid form”, but I believe that this is not a real change. The question arises what is the exact scope of this exception. On the one hand there is no definition of waste waters, so that this is open to interpretation. In the past we had some discussions about this issue in Belgium. To my mind it is clear that only liquids which consist nearly exclusively of water that is polluted can be seen as waste waters. In reality there are indeed many waste materials with a water content of up to 80%. The other question is to which extent waste waters are already covered by Community legislation and, as a consequence, in which respect waste waters could still fall within the scope of the proposed directive. In this connection we must refer in the first place to the Urban Waste Water Directive, which covers urban waste waters and the discharge of waste water from certain industries. The Directive regulates the discharges into collecting systems. It also regulates the discharge into receiving waters of biodegradable industrial waste water from plants belonging to the industrial sectors listed in Annex III. However, the Court of Justice held in its judgment of 10 May 2007 in the *Thames Water Utilities case* that waste water which escapes from a sewerage network maintained by a statutory sewerage contractor pursuant to the Urban Waste Water Directive constitutes waste within the meaning of the Waste Framework Directive. The Court also held that the Urban Waste Water Directive cannot be considered, as regards the management of waste water which escapes from a sewerage network, to be special legislation (a *lex specialis*) vis-à-vis the Waste Framework Directive, and cannot therefore be applied pursuant to Article 2(2) of that Directive. I think that this judgment, although it is debatable, will still be valid under the new Directive. Waste water which escapes from a sewerage network can cause groundwater and soil pollution. If the waste waters contain substances from the black or the grey list, this will fall under the provisions of the Groundwater Directive 2006/188, a daughter Directive of the Water Framework Directive. The Water Framework Directive is relevant too. Discharges of waste waters into surface, coastal and ground waters will fall within the scope of that Directive. Summing up, I would say that discharges of waste waters in water bodies and collecting systems are subject to other Community legislation. If waste waters are not discharged, but stocked and transported for treatment to treatment facilities, such waste waters will fall under the proposed Directive. The exception could be clarified by saying that the “discharge of waste waters” is excluded from the scope of the Directive, that is to say a formulation similar to that on gaseous effluents in Art. 2.1 (a).

- Art. 2.3 provides that, without prejudice to obligations under other relevant Community legislation – one might think that the Water Framework Directive – “*sediments relocated inside surface waters for the purpose of managing waters and waterways or of preventing floods or mitigating the effects of floods and droughts*” – shall be excluded from the scope of the Directive if it is proved that the sediments are non-hazardous. Here also arises the question what is meant by “hazardous”. Shall we refer to the properties listed in annex III which renders waste hazardous? Shall we reason on this point also *a contrario* and must such operations be considered as waste management operations if it cannot be proven that the sediments are non-hazardous? I think this has to be the conclusion.

- “*Re-use*” means “*any operation by which products or components that are not waste are used again for the same purpose for which they were conceived*” (Art. 3, 12). This definition seems to reflect what is commonly understood by “re-use”. Re-use is an operation that falls outside the scope of the Directive, because the products which are “re-used” are not waste, and the Directive is only intended to regulate waste management. In most cases the products or components concerned never were waste before, because the owner never discarded them (e.g. second-hand circuit). However, is it conceivable that products or components, after being discarded by the owner, nevertheless can start a new life as a product through re-use? In other words, can a substance or an object, after being waste, become a product again? Indeed this does not seem to be ruled out in practice. I see it myself from time to time. Especially when there is a collection of special household waste, we see people putting all sorts of things on their doorsteps for collection (e.g. furniture) – since they are discarding these things, they are waste – and other people taking them away before the collection truck arrives, because they want to use these items themselves or bring them – against payment – to the second-hand store, where these items, after being cleaned up or repaired as the case may be, are resold as second-hand products. I believe we must understand the definition of “*preparing for re-use*” (Art. 3.15) in such a context. Something was discarded, but someone will try to give the substance or object a second life, so that it can be used again for the same purpose for which it was originally designed. In this context, we can understand the reference that is made to “checking, cleaning or repairing” “by which products or components of products that have become waste are prepared so that they will be re-used”. Nevertheless, I have a problem with the words “recovery operations” which you can find in the definition. I don’t think we can speak of “cleaning recovery operations” or “repairing recovery operations”. I therefore feel there is something wrong with these words. I see two possibilities. The first is that these words are superfluous, which means that they can be deleted without problem so that you get a sentence you can understand. Or, there is something missing between the words “repairing” and “recovery operations”, e.g. the words “and other”. When you insert these words, you get an intelligible sentence. But does such a sentence have a real meaning? In other words, are there “other recovery operations” that could be considered as “preparing for re-use”? Referring to the recovery operations listed in Annex II, we could think of solvent reclamation/regeneration. But since this is already considered as “recovery of waste”, and therefore covered by the Directive, I don’t see what could be the added value, except that it would make clear that this checking, cleaning and repairing must be considered as a form of recovery of waste and thus a form of waste management. Such an interpretation would not come into conflict with the waste hierarchy of art. 11. Even if that is the correct approach, there still remains another problem. Since “cleaning” and “repairing” should be considered as recovery operations, they should be mentioned in Annex II, which contains a non-exhaustive list of recovery operations.

The question is also how this “preparing for re-use” is dealt with in the operative part of the directive. As “preparing for re-use” is to be considered as a form of recovery, and thus of waste management, Articles 10, 11, 12, 13, 14, 15, 20, 21, 22, 23, 24, 25, 31, 32 and 33 shall apply. If “preparing for re-use” is not to be considered as a form of recovery, then it is unclear which provisions of the Directive will apply, because in that case it is not regarded as a “treatment” of waste (Art. 3, 13), nor as a form of “waste management” (Art. 3, 9). In that event it seems that only Art. 11 would apply.

Finally, I have a problem with the last words of the definition, the words “without any other pre-processing”. It seems to me that these words, too, are superfluous when we combine the definition of “re-use” and “preparing for re-use”. All operations necessary to prepare waste for “re-use” are covered by the second definition, and the first definition seems clear.

- “Recovery” means “any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations” (Art. 3, 14). This definition is new in comparison with the current Directive, in which “recovery” is defined as “any of the operations provided for in Annex II B” and is inspired by the definition proposed by the European Commission and by the ECJ in the *Abfall Service AG* case. “Disposal” means “any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations” (Art. 3, 18). This definition also differs from the current definition (“disposal shall mean any of the operations provided for in Annex II A”), and is inspired by what was proposed by the European Commission and the European Parliament.

When we look at the Annexes, there are no changes as far as the disposal and recovery operations are concerned in comparison with the current situation. However, we found some footnotes clarifying some of the recovery operations.

R1 “Use principally as a fuel or other means to generate energy” is clarified in the sense that it is supposed to include incineration facilities dedicated to the processing of municipal solid waste only where their energy efficiency is equal to or above a certain energy efficiency standard, which is different for new and for existing installations. In the past there was a discussion on how to make a distinction between, on the one hand, the “principal use as a fuel” (R1), which is a recovery operation, and on the other hand the “incineration on land” (D 10), which is a disposal operation. The ECJ held in the case of *Commission v. Germany* of 13 February 2003 (C-228/00) that R1 should be interpreted as meaning that it covers the use of waste as a fuel in cement kilns. In the case of *Commission v. Luxembourg* of the same date (C-458/00) the Court held that, on the contrary, “the shipment of waste in order for it to be incinerated in a processing plant designed to dispose of waste cannot be regarded as having the recovery waste as its principal objective, even if when that waste is incinerated all or part of the heat produced by the combustion is reclaimed. Certainly, such reclamation of energy is in accordance with the Directive’s objective of conserving natural resources. However, where the reclamation of the heat generated by the combustion constitutes only a secondary effect of an operation whose principal objective is the disposal of waste, it cannot affect the classification of that operation as a disposal operation.” In *SITA EcoService Nederland BV* (C-116/01) the Court confirmed what it has said in the *Commission v. Germany* and *Luxembourg* cases, namely that, in order to be considered as use principally as a fuel or other means to generate energy, within the meaning of point R1 of Annex IIB to the Directive, it is both necessary and sufficient that the combustion of waste meet the three conditions set out in that judgment. First, the main purpose of the operation concerned must be to enable the waste to be used as a means of generating energy. Secondly, the conditions in which that operation is to take place must give reason to believe that it is indeed a means to generate energy. Thirdly, the waste must be used principally as a fuel or other means of generating energy. The Court added that the calorific value of waste which is to be combusted is not a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 or a recovery operation as referred to in point R1. The Member States may establish distinguishing criteria for that purpose, provided that the criteria comply with those laid down in the Directive. I have no sufficient knowledge of the technical aspects of what is written in this footnote and I am not qualified to assess whether it is justified on environmental grounds or not and what could be the consequences of this for the waste management industries. What is, however, clear in my mind is that, although something which should normally be considered as a disposal operation, is exceptionally classified as a

recovery operation. In doing so, and provided that the formula is sufficiently clear and can be applied on a stable basis, it nevertheless clarifies in theory the distinction between the two types of operations and reduces in doing so the scope for legal discussion. However, when we look at Article 35.1, which allows differentiated guidelines according to different local climatic conditions, we get the impression that legal discussion will be stimulated once more.

R3 “Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation process” is meant now to include gasification and pyrolysis using the components as chemicals.

R5 “Recycling/reclamation of other inorganic materials” is meant to include soil cleaning resulting in recovery of the soil and recycling of inorganic construction materials.

R12 “Exchange of waste for submission to any of the operations numbered R1 tot R11” is supposed to include, when there is no other appropriate R-code, preliminary operations prior to recovery including pre-processing such as, inter alia, dismantling, sorting, crushing, compacting, pelletizing, drying, shredding, conditioning, repacking, separating, blending or mixing prior to submission to any of the operations numbered R1 to R11. One can find a similar footnote under D13.

As far as R13 is concerned, a footnote says that the excluded temporary storage, pending collection, on the site where the waste is produced, should be understood as “preliminary storage according to point 10 of Article 3. One can find a similar footnote under D15.

Where an operation is not listed in the Annexes, it should be decided case by case whether the operation is a disposal or a recovery operation in the light of the objectives of the Directive, and now taking into account the general definition of both types of operations. This approach is consistent with the judgment of the Court of Justice in the *Abfall Service AG* case. All operations that cannot be classified as recovery operations must be regarded as disposal operations, even where the operation has as a secondary consequence the reclamation of substances or energy. This is consistent with the *Luxembourg* case.

- “Recycling” means “any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations” (Art. 3, 16). The definition is different from that of the Waste Packaging Directive (“the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery”), from that of the End of Life Vehicles Directive (“the reprocessing in a production process of the waste materials for the original purpose or for other purposes but excluding energy recovery. Energy recovery means the use of combustible waste as a means to generate energy through direct incineration with or without other waste but with recovery of the heat”) and that of the Electrical and Electronic Equipment Waste Directive (“the reprocessing in a production process of the waste materials for the original purpose or for other purposes, but excluding energy recovery which means the use of combustible waste as a means of generating energy through direct incineration with or without other waste but with recovery of the heat”). So the idea seems to be that only the recycling of materials is to be considered as recycling and not the reclamation of energy in its different forms. This seems consistent with the new waste hierarchy (Art. 11) in which recycling is preferred to other recovery operations, such as energy recovery. The exclusion of backfilling operations can also be understood.

- The new provision on by-products (Art. 4) seems to contribute to clarity and legal certainty as it codifies to a large extent the case-law of the ECJ as it results from cases like *Tombesi*, *Palin Granit*, *Arco Chemie*, *Avesta Polarit*, *Saetti* and *Niselli*. Indeed, the accessibility of a text of a Directive is much easier for most of the stakeholders in waste management than that of the case-law of the ECJ, especially when one has to combine several cases in search of an answer to a particular question. The criteria are of course not all that easy to apply. When we look at the criterion under Article 4.1 (d), we must be aware that only for a number of categories of products or materials are there currently “product, environmental and health protection requirements”. Assessing whether the use “will not lead to overall adverse environmental or human health effects” will often not be all that easy. Daughter Directives on the basis of Article 4.2 are therefore welcome. The same can essentially be said about Article 5 on the end-of-waste status.

- Article 11 contains the new waste hierarchy, which is more sophisticated than the previous one. According to Article 11.2, when applying the waste hierarchy, Member States must take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by “life cycle thinking on the overall impacts of the generation and management of such waste”. It is unclear what is meant in this context by “life cycle thinking”. Maybe it should be understood as the “life cycle approach” which is used in the Ecolabel Regulation. In that Regulation you can read that the environmental impacts of products must be identified on the basis of examination of the interactions of products with the environment, including the use of energy and natural resources, during the life cycle of the product (Art. 1.2). The life cycle starts with the pre-production stage, which includes extraction or the production and processing of raw materials and energy production (Art. 3, (c)); furthermore, there is the production and distribution phase (including packaging), the phase in which the product is used (or re-used) and the final stage of recovery or disposal (see also the matrix in the Annex to the Ecolabel Regulation). So, in my understanding, this “life cycle thinking” could be interpreted in such a way that one may opt for a waste treatment method that is considered less environmentally friendly, for instance disposal, if that is “offset” by a better environmental performance in the earlier lifecycle stages of the product. How such an assessment will be made, however, is unclear and open to interpretation.

These are the thoughts I wished to share with you. I hope they may be useful to those who will be involved in the second reading.